

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

-----In the Matter of----- )  
 )  
 PUBLIC UTILITIES COMMISSION )  
 )  
 Instituting a Proceeding to )  
 Investigate the Implementation of )  
 Feed-in Tariffs. )  
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THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM'S  
RESPONSES TO CERTAIN THRESHOLD LEGAL ISSUES (QUESTIONS 1 - 3)  
SET FORTH IN APPENDIX C TO THE NATIONAL REGULATORY RESEARCH  
INSTITUTE'S SCOPING PAPER ENTITLED "FEED-IN TARIFFS: BEST DESIGN  
FOCUSING HAWAII'S INVESTIGATION"

AND

CERTIFICATE OF SERVICE

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The Department of Business, Economic Development, and Tourism  
("Department" or "DBEDT"), by and through its Director  
("Director") in his capacity as the Energy Resources  
Coordinator, and through the undersigned Deputy Attorney  
General, hereby submits to the Hawaii Public Utilities  
Commission ("Commission") its responses to the threshold legal  
issues identified in Appendix C of the Commission's scoping  
paper titled "Feed-in Tariffs: Best Design Focusing Hawaii's  
Investigation" issued on December 11, 2008.

Threshold Legal Issues:

1. If the price associated with a feed-in tariff exceeds the utility's avoided cost, then by definition the utility's customers will incur higher costs than they would in the absence of the feed-in tariff. Please comment on the legal implications of this result. For example:
  - a) Is this result permissible under current Hawaii statutes?
  - b) Does HRS §269-27.2 create a ceiling on the feed-in tariff price?
  - c) If so, how do the signatories to the Energy Agreement (or other parties to this proceeding) propose to demonstrate that each feed-in tariff price does not violate the statute?

DBEDT Response:

1.a) HRS §269-27.2 provides the statutory framework for the Commission to direct the public utilities in their purchase of electricity from nonfossil fuel sources, including a cap on the public utilities' purchase power rates to the supplier or producer. HRS §269-27.2 requires that

In the exercise of its authority to determine the just and reasonable rate for the nonfossil fuel generated electricity supplied to the public utility by the producer, the commission shall establish that the rate for purchase of electricity by a public utility shall not be more than one hundred per cent of the cost avoided by the utility when the utility purchases the electrical energy rather than producing the electrical energy.

Based on the language of the law, the Commission's determination of just and reasonable feed-in tariff rates cannot exceed the utility's avoided cost.

1.b) As stated above in 1.a), §269-27.2, HRS does create a ceiling on the feed-in tariff price, at least to the extent that the Commission must take a part in the tariff's determination as just and reasonable. This state statutory provision also provides that the "commission's determination of just and reasonable rate shall be accomplished by establishing a methodology that removes or significantly reduces any linkage between the price of fossil fuels and the rate for the nonfossil fuel generated electricity...", and where the Commission deems it appropriate, the just and reasonable rate for nonfossil fuel generated electricity "may include mechanisms for reasonable and appropriate incremental adjustments, such as adjustments linked to consumer price indices for inflation or other acceptable adjustment mechanisms." Therefore, the final determination of a utility's avoided cost in any given situation is context-sensitive and changeable. A feed-in tariff could be formulated with this dynamic in mind so that the avoided cost ceiling is more flexibly construed, allowing greater leeway for the feed-in tariff, consistent with the policy mandates of the statute to "[e]ncourag[e] the maintenance or development of nonfossil fueled sources of electrical energy."

1.c) The feed-in tariff rates require Commission approval, and the statutory requirements for their determination as just

and reasonable are provided in §269-27.2, HRS. Since the feed-in tariffs are designed to set the purchase power rates for an extended period of time in the future, the tariff design should consider incorporating an adjustment mechanism and procedure to ensure that the rates are in compliance with the statutory requirements.

2. As with any administrative agency decision, a Commission decision approving a feed-in tariff must be supported with substantial evidence.
  - a) Focusing on the price term, what evidence is legally necessary? Consider these options, among others:
    - i) evidence of actual costs to develop similar projects in Hawaii
    - ii) generic (i.e., non-Hawaii) evidence of costs associated with each particular technology
    - iii) evidence that the tariff price results in costs equal to or below the utility's avoided cost
  - b) By what process do the signatories (and other parties to this proceeding) propose to gather this evidence and present it to the Commission, under the procedural schedule proposed by the signatories?

DBEDT Response:

2.a) DBEDT agrees that a Commission decision approving a feed-in tariff must be supported with substantial evidence, including the renewable resources' actual and/or estimated costs (i.e., installed costs, operation and maintenance costs, capital costs) where available at the time when the feed-in

tariff is being determined, the reasonable and applicable adjustment cost indices, as well as verified generic or industry cost data deemed applicable to Hawaii. Any estimated resource cost data must specify how the estimates are determined.

The substantive evidence must also include the utility's avoided costs, including a rigorous and policy-sensitive assessment of what that avoided cost should include (e.g., costs avoided by the utility in not being required to produce the same power itself from nonfossil fuel generation) and how such costs are determined.

2.b) DBEDT acknowledges that the proposed expedited schedule for the instant docket may not provide adequate time to compile complete and exhaustive cost data and information as desired. DBEDT also recognizes that the initial feed-in tariffs resulting from this docket will have to be modified and updated from time to time as more complete and updated data inputs (e.g., cost data, information on the renewable resources and technology) become known and available. The parties' responses to Appendix A of the Commission's scoping paper will provide some data that could be used in the determination of the initial feed-in tariff rates.

3. Assume the Commission does create feed-in tariffs, which entitle the seller to sell to the utility at the tariff price.
- a) If the tariff price exceeds the utility's avoided cost, is there a violation of PURPA, provided the seller is relying on a state law right to sell rather than a PURPA right to sell?
  - b) If the tariff price exceeds the utility's avoided cost (as calculated prior to the existence of the tariff), could a seller assert a PURPA right to a sale at the tariff price, on the grounds that the utility now has a new "avoided cost" equal to the cost it would have incurred under the state-mandated feed-in tariff?
  - c) If the price associated with a feed-in tariff is less than the utility's avoided cost, what benefit does the tariff offer the developer that is not already available under PURPA?
  - d) Please offer any other comments concerning the legal and practical relationship between the feed-in tariff and existing PURPA rights and obligations.

DBEDT Response:

3.a) To some extent the premise of this question appears to assume an inconsistency between the federal Public Utility Regulatory Policies Act (PURPA) mandates passed by the U.S. Congress and the implementation of that policy in state laws and regulations that PURPA never contemplated. A "PURPA right to sell" would not be relied on by a local nonfossil fuel electric power producer since it is the state law rights implementing the standards of the federal framework (which the state considers and either accepts or

rejects, pursuant to 16 U.S.C. §2621(a) for instance), upon which the local nonfossil fuel power producer would rely.<sup>1</sup> PURPA was meant to promote greater use of renewable energy. The goal of creating feed-in tariffs is also to promote the increased use and development of renewable energy resources. PURPA requires that the rates for purchases by electric utilities from qualifying cogeneration facilities or qualifying small power production facilities be just and reasonable to electric consumers and in the public interest; shall not discriminate against qualifying cogenerators or qualifying small power producers; and shall not exceed the incremental cost to the electric utility of alternative electric energy. PURPA defines the incremental cost of alternative electric energy as the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source. 16 U.S.C. §824a-3(d). The State statutory requirement for the Commission determination of just and reasonable purchase power rates by the utilities to nonfossil fuel energy producers as provided in HRS §269-

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<sup>1</sup> An example of a State law, rule or standard upon which a local producer can rely would be the Commission's rules for factors affecting rates of purchase, which include considering the reduction of fossil fuel use by the utility. §6-74-23(3). Such rulemaking by the Commission poses no conflict with PURPA.



27.2, not to exceed the utility's avoided cost, is consistent with the PURPA requirement. DBEDT does not believe that the feed-in tariffs that will be determined and approved by the Commission in this docket will exceed the utility's avoided cost or violate PURPA.

3.b) The creation or establishment of feed-in tariffs, particularly tariffs which conform to existing law, would not change the statutory definition of "avoided cost" and create a new baseline, as this question suggests. Further, as set forth above, no local producer would be asserting a "PURPA right" but would proceed under state law; therefore, for both these reasons the answer to this question is "no."

3.c) Feed-in tariffs provide standardized published purchase power rates that the utilities will pay for purchases of energy from renewable resources. It is a mechanism to instigate change in the way power is produced, to gradually shift from fossil-based central station-based generation to renewable resource-based distributed generation. Feed-in tariffs provide the following benefits to developers: (1) long-term certainty and stability of the renewable resources' prices that the utilities will pay; (2) a standardized process and procedure for the utilities' procurement of power from renewable resources, and elimination of the need for long and potentially costly

contract negotiation with uncertain outcomes; and (3) an equitable opportunity to all willing participants in the market.

3.d) For the reasons stated above in 3.a) and b), DBEDT believes that the State's statutory requirements for the Commission's determination of just and reasonable rates are consistent with PURPA requirements.

In conclusion, DBEDT believes that well designed feed-in tariffs that incorporate mechanisms and elements that ensure their compliance with the State and PURPA requirements for just and reasonable rates will help transform the electric energy sector and achieve Hawaii's energy security and independence.

DATED: Honolulu, Hawaii, January 12, 2009.

  
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Certificate of Service

I hereby certify that I have served a copy of the response to the Threshold Legal Questions in Appendix C of the Commission' scoping paper titled "Feed-in Tariffs: Best Design Focusing Hawaii's Investigation", by the Department of Business, Economic Development, and Tourism in PUC Docket Number 2008-0273, by electronic transmission on the date of signature to each of the parties listed below.

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